IN THE SUPREME COURT OF MISSOURI

SC 92564

VICTOR ALLRED,

Respondent/Cross-Appellant,

vs.

ROBIN CARNAHAN,

Respondent,

and

THOMAS SCHWEICH,

Appellant/Cross-Respondent,

and

MISSOURI JOBS WITH JUSTICE,

Respondent/Cross-Appellant.

On Appeal from the Circuit Court of Cole County
Honorable Judge Jon E. Beetem

OPENING BRIEF OF RESPONDENT/CROSS-APPELLANT VICTOR ALLRED

June 8, 2012

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Article V, Section 3 of the Missouri Constitution. Mr. Allred challenged the constitutionality of § 116.175, RSMo, which falls within the exclusive jurisdiction of this Court. In addition, all appeals arising from the trial courts' judgments in this case and in two other petition cases were to be filed in this Court.

STATEMENT OF FACTS

The Petitions

On October 4, 2011, Christopher Grant, counsel for Intervenor-Cross-Appellant Missouri Jobs With Justice ("JWJ"), submitted to the Secretary of State sample sheets for two initiative petitions, 2012-084 and 2012-085. L.F. II at 208-209 ¶ 8; App. at A47-A48 ¶ 8, A57-A68. The petitions proposed amendments to Missouri's minimum wage law in Chapter 290 of the Missouri Revised Statutes. *Id*.

Both petitions sought an increase in the minimum wage to $8.25 per hour. *See* L.F. I at 25-29, 30-34; App. at A57-A68. Both petitions would continue Missouri's current requirement that the state minimum wage be adjusted annually according to changes in the Consumer Price Index ("CPI"). *Id*. As to tipped workers, both petitions would increase the part of the minimum wage required to be paid directly by employers (who are also responsible for making up any shortfall if workers' tips are insufficient to cover the difference between the

employer-paid compensation and the minimum wage) to 60% of the minimum wage. *Id.*

A Difference in the Two Versions of the Petition

The petitions differed in an important respect. Current Missouri law requires employers to pay the higher of the state minimum wage or the federal minimum wage. The federal wage, unlike the state wage, is not annually adjusted for changes in cost of living. Petition 2012-084 (also known as "Version 1"), however, provided that if the federal minimum wage is higher than the CPI-adjusted state minimum wage in a given year, the state wage would be increased to meet the federal wage, and the newly increased state minimum wage would remain subject to annual increases according to the CPI. L.F. I at 28; App. at A61. Petition 2012-085 (also known as "Version 2") did not contain this provision. L.F. I at 33; App. at A67.

Thus, under current law and Version 2, the "starting" state wage is increased by the CPI each year, but in the event the federal wage remains higher, the federal wage is used year after year without a CPI adjustment. *Id*. Under Version 1, in contrast, the federal wage (which would become the state wage) is increased year after year by the CPI. At trial, Mr. Allred therefore referred to Version 1 as containing a "super-escalator."

Identical Summary Statements for the Two Different Petitions

The Secretary of State prepared an identical summary statement for both Version 1 (which contained the super-escalator) and Version 2 (which did not). L.F. I at 39-40, 41-42. The summary reads as follows:

> Shall Missouri law be amended to:
>
> - increase the state minimum wage to $8.25 per hour, or to the federal minimum wage if that is higher, and adjust the state wage annually based upon changes in the Consumer Price Index;
> - increase the minimum wage for employees who receive tips to 60% of the state minimum wage; and
> - modify certain other provisions of the minimum wage law including the retail or service businesses exemption and penalties for paying employees less than the minimum wage?

Id.

The Fiscal Note Process

On October 5, 2011, the day after Mr. Grant filed the petitions, the State Auditor received the sample sheets from the Secretary of State and began to work on the fiscal note and summary. *See* L.F. I at 43, 57; App. at A57-A68. The only statute specifying the Auditor's fiscal note duties is Section 116.175, RSMo. It provides in relevant part:

> 1. …upon receipt from the secretary of state's office of any petition sample sheet, joint resolution or bill, the auditor **shall assess the fiscal impact of the proposed measure**. The state auditor *may consult* with the state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal. Proponents or opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact estimating the cost of the proposal…provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state.
>
> 3. **The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities.** The fiscal note summary shall contain no more than fifty words, excluding articles, which **shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure**.
>
> 4. The attorney general shall, within ten days of receipt of the fiscal note and the fiscal note summary, approve the legal content and form of the fiscal note summary prepared by the state auditor and shall forward notice of such approval to the state auditor.

§ 116.175, RSMo. (relevant mandatory duties are bolded, and discretionary duties are italicized).

A single employee in the Auditor's office, Jon Halwes, performs the substantive work of preparing fiscal notes and summaries. Tr. 29:14-20. No other person in the Auditor's office, including the Auditor himself, typically reviews Mr. Halwes' work, and the same was true with respect to the petitions submitted by Mr. Grant. Tr. 30:11-17. Mr. Halwes had been working on petition fiscal notes for less than a year when he received the minimum wage petitions; most of Mr. Halwes' training had been "on the job" working by himself. Tr. 30:18-31:5.

Mr. Halwes and the Auditor's office have no manuals, rules, or procedures for preparing fiscal notes except for their unwritten interpretation of the text of Section 116.175, RSMo. Tr. 31:6-15. The Auditor's primary unwritten rule is that, with rare exceptions, it pastes verbatim into the fiscal note the fiscal impact responses it receives from state and local agencies, proponents, and opponents, making as few changes as possible. Tr. 31:16-32:16.

The Auditor undertakes absolutely no "independent analysis or research" other than to paste the responses into the fiscal note for a petition. L.F. II at 221; App. at A16, A50-51 ¶¶ 19-23. The Auditor's office admitted that it sometimes followed-up with an entity when the entity's response seems "incomplete" or the issues "directly impact them." Tr. 89:23-90:17. It claims to do this on a "case-by-case basis." Tr. 90:18-19. The Auditor's guiding light is the office's own determination as to whether data from the entity will be "relevant" to the "voters." Tr. 34:4-35:1; 66:7-12; 68:1-6; 71:19-72:5; Tr. 73:3-16 (in response to question of whether Auditor's office should have tried to determine if costs were only slightly

over $1 million, or were "$10 or $20 million," Mr. Hawles testified, "I would say that we put in the work to comply with the requirements of 116.175, and to the extent that we're providing relevant information to the voters, we did that.").

On direct examination, Mr. Hawles admitted that his office employs no objective or discernible subjective criteria in deciding whether given information will be "relevant to the voters:"

> Q. Well, you would agree with me that over a million, as in 1.4, 1.5 million, is a substantial difference from over a million as in 10 or 20 million, correct?
>
> A. Definitely there is a difference.
>
> Q. Well, it is a substantial difference, right?
>
> A. There is a difference how much it is going to affect the voter. In terms of his or her decision process, I don't know.

Tr. 72:10-18.

> Q. Let me ask you this, Mr. Halwes. On the issue of direct costs, which you said was the most important part of the fiscal note summary, was it relevant for voters to know whether the cost was $1.2 or $1.3 million or $10 or $30 million?
>
> A. That's the question?
>
> Q. Yes.
>
> A. The—I'm not sure that any of the numbers are going to resonate with the voters any more than another. And the purpose—I mean, I

specifically used the term exceed. I didn't use the term over or about, with the understanding that the voter would see that it is going to be over a million dollars, exceed a million dollars.

Q. What criteria do you use to determine what is going to be relevant to the voters?

A. It is going to vary by fiscal note that we're doing, in terms of the type of information that we get in and what we can pull together from the various sources.

Q. Ultimately isn't it just guesswork?

A. Well, everything that we're doing here is to some extent guesswork.

Tr. 73:25-74:20.

The Auditor Produces Identical Fiscal Notes for Versions 1 and 2

The Auditor's fiscal notes and fiscal note summaries for Versions 1 and 2 were identical. *Compare* L.F. I at 43-56 and L.F. I at 57-70; App. at A69-A82, A83-A96. The Auditor settled upon the following fiscal note summary for both measures:

> Increased state and local government wage and benefit costs resulting from this proposal will exceed $1 million annually. State government income and sales tax revenue could increase by an estimated $14.4 million annually; however, business employment decisions will impact any potential change in

revenue. Local government revenue will change by an unknown amount.

L.F. I at 43, 57; App. at A69, A83.

Mr. Halwes arrived at this summary in the following manner. First, he sent requests for fiscal impact estimates to a pre-set list of approximately 25 state agencies and 25 localities or political subdivisions. Tr. 80:5-81:4; L.F. I at 44, 58; App. at A70, A84. (showing that approximately 25 state agencies and 25 cities, counties, school districts, and other subdivisions were contacted). Mr. Halwes believes that the selected local subdivisions represent a "cross section" of the state, but admitted that he doesn't know how they were chosen. Tr. 80:24-81:4. Mr. Halwes admitted he didn't know how many state and local entities employ minimum wage workers, or even what proportion of state and local entities employ minimum wage workers. Tr. 66:13-67:10. Mr. Halwes admitted that the number of state and local agencies and subdivisions that employ minimum wage workers could be in the hundreds, but he did not know. Tr. 67:6-14.

Direct Costs Incurred by Public Entities to Pay Wage Increases

The issue of direct cost of wage increases paid by state and local government entities was the Auditor's "key" issue for purposes of the fiscal note and summary. Tr. 65:20-66:2. But Mr. Halwes admitted that he never intended to use his twenty-five-entity "cross-section" in the usual manner—to make a projection, extrapolation, or estimate regarding the size or characteristics of the "whole." Tr. 68:21-69:5. When asked why the Auditor never makes a projection or

extrapolation as part of the fiscal note process, Mr. Halwes simply stated, "I can't answer that question." *Id*. Nonetheless, Mr. Halwes recognized from the outset that by failing to make any projection or extrapolation from the "cross section," the fiscal note and summary would necessarily under-report a broad-based cost like the minimum wage: he "knew from the local governments that didn't respond to us that clearly there would be more." Tr. 92:2-5.

The Auditor's one and only request to the twenty-five entities, itself a subset of the potentially hundreds of entities that employed minimum wage workers, netted a total of seven responses. The seven responses (in addition to the Office of Administration, which purported to respond for all state-level agencies) were as follows:

City of Columbia	$140,885.01
City of Jefferson City	$98,947.00
City of St. Joseph	$102,350.00
City of St. Louis	failed to address direct costs
Jasper County	$0 (all workers exceeded the minimum)
Linn State Technical College	$25,000
Metropolitan Community College	$405,000
Office of Administration	$540,000 (or "over" this amount)

L.F. I at 44-48, 58-62; App. at A70-A74, A84-A88.

This smattering of responses alone added up to over $1.3 million. Mr. Halwes performed no independent analysis, projection, or extrapolation, and

reached no logical or expert conclusion based upon these responses. Instead, he simply added the seven numbers together and, in the fiscal note summary, stated that costs to state and local entities "will exceed $1 million."

Mr. Halwes made no effort to follow-up with the state's largest cities, Kansas City, Springfield, or St. Louis, which either failed to respond at all or which failed to address the issue in their response. Mr. Halwes made no effort to follow up with large community colleges and universities, such as the University of Missouri, or with any of the seven large counties who failed to respond. L.F. I at 56, 70; App. at A82, A96; Tr. 73:3-13.

Indeed, Mr. Halwes did not even attempt to find out why certain large public entities failed to respond to his first and only request. Tr. 70:10-71:3. With respect to the City of St. Louis, which the Auditor's office had errantly assumed was the largest city in Missouri (Tr. 69:6-17), Mr. Halwes later claimed he simply "didn't see a need to" make any contact after the City of St. Louis inexplicably left off a "direct cost" number from its narrative fiscal impact statement. Tr. 71:3. This was despite the fact that the office recognized the City of St. Louis was "potentially" the most relevant city in the state (Tr. 71:4-6), because "the bigger the city the more relevant the result it gives you in terms of costs." Tr. 69:14-17.

In contrast to its use of the non-statutory "relevance to voters" criterion in failing to seek data from large public entities to determine direct public costs, the Auditor's office "choose[s] not to enforce" a statutory "10-day limit" for receiving fiscal impact statements of petition proponents. Tr. 82:14-22. Mr. Halwes claims

that it disregards the ten-day deadline because "the more information that we can obtain the better fiscal note and fiscal note summary we can have, and if we get it within the time frame to allow us to analyze it, then I'm going to include it." *Id*.

Here, the proponents of the minimum wage petitions submitted a fiscal impact statement several days after the ten-day deadline, which ran on October 15, 2011, via a Thursday, October 20, 2011 email from Lenny Jones, identified as a political operative of the Service Employers International Union ("SEIU"). L.F. II at 209; App. at A47-A48 ¶ 8, A99-A122. This left less than three business days before both the fiscal note and fiscal note summary had to be completed and turned in.

The proponents estimated—and the Auditor then agreed and adopted the assumption—that Missouri employers, both public and private, would pay out an additional $360 million each year as a result of the minimum wage increase. L.F. I at 50, 64; App. at A76, A90. But of that $360 million combined payout by private and public employers, the Auditor's "direct cost" statement assumes that state and local government agencies and political subdivisions' share is merely some amount that "exceeds" $1 million. The Auditor provided no evidence at trial that after accepting this late submission from the proponents, Mr. Halwes made any effort to question whether his "exceeds $1 million" statement, derived by adding together just seven responses, was a reasonable estimate for the public share of the $360 million public-and-private payout.

The evidence at trial showed that direct costs to state and local agencies and political subdivisions are not close to $1 million. Mr. Allred's expert witness, Dr. David Macpherson, testified that the true cost is over $16 million per year. Tr. 149:10-151:4. Dr. Macpherson was able to use publicly-available data from the Current Population Survey ("CPS") to make a reliable calculation, and did not require a complete roster of every Missouri worker. Tr. 150:16-151:13. Dr. Macpherson's entire analysis on all parts of the fiscal note, of which his "direct cost" work was only one part, took just 12 to 15 hours. Tr. 141:14-17.

Indirect Effects, Including Possible Increased Tax Revenue

The Auditor also received information from three sources regarding possible indirect fiscal impacts of the initiatives: increased or decreased tax revenues arising from businesses' payment of—and workers' receipt of—$360 million in increased wages. L.F. I at 46-55, 60-69; App. at A72-A81, A86-A95 (the submissions of the Office of Administration, City of St. Louis, and SEIU/Jobs With Justice).

The only materials the Auditor received—both from the Office of Administration and from the proponents—indicated that among five possible "indirect" effects were *cuts* in two possible areas: (1) employment; *or* (2) business investment. L.F. I at 46, 60; 53, 67; App. at A72, A86; A79, A93. The Office of Administration predicted "lower overall employment (if employers choose to hold costs steady)" and "lower business investment (if employers' payrolls increase)." L.F. I at 46, 60; App. at A72, A86. The proponent, copying a 2006 Office of

Administration format and layering in their own projections, also submitted predictions of "the potential for lower employment, especially at firms dependent on low-wage labor," and "the potential for decreased business investment by certain firms dependent on low-wage labor." L.F. I at 53, 67; App. at A79, A83. Finally, the City of St Louis predicted, "while raises to the minimum wage could potentially result in an increase in local earnings and payroll taxes, there is also the potential that the increased payroll costs could be offset by a reduction in workforce at affected establishments thus negating all or a portion of the revenue gains." L.F. I at 48, 62; App. at A74, A88.

On the question of whether the Auditor's reported $14.4 million might be offset by businesses' employment or spending cuts, all of this evidence pointed in the same general direction. First, there was no evidence before the Auditor indicating that *only* job cuts, and not *also* cuts in business investment, would occur. Mr. Halwes specifically acknowledged at trial that both types of cuts could occur in order to compensate for increased wage costs. Tr. 59:17-62:7. Nor did any materials received by the Auditor indicate that minimum wage hikes would have any affect other than to *decrease* employment, or investment, or both. Both the Office of Administration and the proponents submitted a list of bullet points indicating that any wage increase would cause a *negative* effect on employer costs. L.F. I at 46, 60; 53, 67; App. at A72, A86; A79, A93. Finally, the only facts the

Auditor received from any submitter (the City of St. Louis)[1] indicated that job cuts and decreased business investment would have a *negative* effect on tax revenues, not a positive one. L.F. I at 48, 62; App. at A74, A88.

Despite the one-way nature of the three submissions which dealt with revenue, the "indirect" portion of the Auditor's fiscal note summary *failed* to report that the $14.4 million revenue increase could only be eroded, and could not be augmented, by "business decisions." Instead, by failing to describe the business decisions being discussed by his submitters (job cuts or spending cuts), the Auditor left open the possibility that the increase would be "impacted"—that it could go up or down:

[1] At best, the proponents' late submission failed to address the issue by making no calculation of any negative economic or fiscal effects from forcing businesses to find $360 million to pay workers. But even then, Mr. Halwes admitted that the proponents' failure made their analysis "somewhat incomplete," and claimed that it had been necessary to address this incompleteness "as part of the fiscal note summary." Tr. 58:5-59:15. And ultimately, Mr. Halwes had to acknowledge that the $360 million in new wage income (upon which he relied to assume a state revenue increase of $14.4 million) could not be created out of thin air, and "would either potentially come out of revenues or profits of businesses." Tr. 59:17-25.

> State government income and sales tax revenue could increase by an estimated $14.4 million annually; however, **business employment decisions will impact** any potential change in revenue.

L.F. I at 43, 57; App. at A69, A83 (emphasis added). The Auditor presented no evidence at trial supporting his use of ambiguous phrases to suggest possible outcomes that were not addressed in any of the submissions he received.

The Lawsuit and Procedural History

On November 17, 2011, Cross-Appellant Victor Allred, a citizen, resident, registered voter, and taxpayer of the State of Missouri, timely filed a petition, pursuant to Section 116.190, RSMo., challenging the summary statement, fiscal note, and fiscal note summary for Version 1 and Version 2 of the minimum wage petition. L.F. I at 8-78; L.F. II at 208, 210.[2] The Secretary of State and State Auditor were named as defendants. Subsequently, JWJ, the proponent of the initiatives, intervened as a defendant. L.F. I at 7.

On April 9, 2012, Mr. Allred moved for partial judgment on the pleadings on Count I of his lawsuit, which was his challenge to the sufficiency and fairness of the summary statement. L.F. I at 4, 106-112. JWJ and the Secretary of State filed cross-motions for judgment on the pleadings on Count I, and the trial court

[2] On April 10, 2012, Mr. Allred moved to amend his Petition to add a Count IV, a challenge to the Auditor's constitutional authority to prepare a fiscal note or summary. L.F. I at 4, 113-116.

heard arguments on the cross-motions. L.F. I at 3. On April 25, 2012, the trial court entered its order denying Mr. Allred's motion and granting the defendants' cross-motions. L.F. I at 2, 173-180; App. at A30-A37. The trial court held that the summary statement for Version 1 "constitutes a fair and sufficient summary and provides notice of the purposes of the proposal for those interested or affected by the proposal." L.F. 176 ¶ 11; App. at A33 ¶ 11. [3]

Trial on the sufficiency and fairness of the fiscal note and fiscal note summary (Counts II and III) and the constitutional authority of the Auditor (Count IV) was held before Judge Jon Beetem of the Cole County Circuit Court on May 1, 2012. The parties did not dispute the contents or dates of the fiscal note, fiscal note summary, or the submissions made by third parties to the Auditor. L.F. II at 208-209; App. at A3-A4, A46-A122.

On May 18, 2012, the trial court entered its judgment in favor of Cross-Appellant Allred on his constitutional challenge to the Auditor's authority (Count IV), but against Mr. Allred on his challenges to the sufficiency and fairness of the fiscal note and fiscal note summary (Counts II and III). L.F. II at 206-234; App. at A1-A29. In sustaining Mr. Allred's constitutional claim, Judge Beetem observed:

[3] JWJ represented to the trial court that it had "withdrawn" Version 2 of the petition. L.F. I at 139-150. Accordingly, the trial court declined to issue any judgment on the summary statement, fiscal note, and fiscal note summary for Version 2.

> The facts showed that the Auditor's work was not an "investigation." …At trial…the Auditor's representative admitted that he simply pasted voluntary responses into the fiscal note, and then summarized these receipts in fifty words without making any follow-up inquiry to any of the voluntary responders. He contended that this is all Section 116.175 requires. If the Auditor's mere compilation of responses and "sufficient and fair" summary of those responses is all that Section 116.175 requires, then that statute does not require an "investigation" as the Constitution understands it. Instead, it requires something closer to clerical work.

L.F. II at 231-232; App. at A26-A27 (Opinion at 26-27).

Mr. Allred appeals from the trial court's judgment on the sufficiency and fairness of the summary statement, fiscal note, and fiscal note summary for Version 1 of the initiative.

POINTS RELIED ON

I. THE TRIAL COURT ERRED BECAUSE THE SUMMARY STATEMENT IS INSUFFICIENT AND UNFAIR IN THAT IT FALSELY SUGGESTS THAT THE INITIATIVE WOULD "AMEND" THE LAW TO ENACT A NEW PROVISION THAT ALREADY EXISTS UNDER MISSOURI LAW AND IT FAILS TO ACCURATELY AND ADEQUATELY DESCRIBE THE LEGAL EFFECT OF THE PROPOSED MEASURE.

- Section 116.190, RSMo.
- Section 116.334, RSMo
- *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010) ("*MML I*")
- *Missouri Municipal League v. Carnahan*, 2011 WL 3925612 (Mo. App. W.D. 2011) (trans. denied Dec. 20, 2011) ("*MML II*")

II. THE TRIAL COURT ERRED BECAUSE THE FISCAL NOTE AND FISCAL NOTE SUMMARY ARE INSUFFICIENT AND UNFAIR IN THAT THEY DO NOT COME CLOSE TO ASSESSING OR ESTIMATING THE DIRECT COSTS OF THE MINIMUM WAGE INCREASE, AND THEN FALSELY SUGGEST THAT TAX REVENUE INCREASES MAY NOT BE OFFSET IF BUSINESSES ARE FORCED TO REDUCE EMPLOYMENT OR SPENDING TO PAY FOR THE WAGE HIKE.

- Section 116.190, RSMo.
- Section 116.175, RSMo.
- *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010) ("*MML I*")
- *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266 (Mo. App. W.D. 2000)

ARGUMENT

I. THE TRIAL COURT ERRED BECAUSE THE SUMMARY STATEMENT IS INSUFFICIENT AND UNFAIR IN THAT IT FALSELY SUGGESTS THAT THE INITIATIVE WOULD "AMEND" THE LAW TO ENACT A PROVISION THAT ALREADY EXISTS UNDER MISSOURI LAW AND IT FAILS TO ACCURATELY AND ADEQUATELY DESCRIBE THE LEGAL EFFECT OF THE PROPOSED MEASURE

A fundamental principle of Missouri's initiative law is that voters must be fairly informed—in words they can understand—of the subject matter, legal impact, and purpose of an initiative. The Secretary of State is charged with giving effect to this principle through the preparation of a summary statement for each initiative petition circulated in the State of Missouri. The summary statement, which appears prominently on the face of each petition and on the ballot, is then relied upon by petition signers and voters to form their opinions on a proposed measure.

The Secretary is sensibly given some deference in drafting summary statements. This deference has limits, however. At a minimum, Missouri law requires that the summary be accurate and adequate. The summary statement for the minimum wage petition is neither. It falsely describes the purpose and effect of the initiative's proposed statutory amendment and omits any reference to a core

feature of the measure. Accordingly, the trial court erred by failing to certify a new, revised summary statement to the Secretary that accurately and adequately summarizes the initiative. The trial court should be reversed.

A. Standard of Review

The sufficiency and fairness of the Secretary's summary statement was adjudicated on the parties' cross-motions for judgment on the pleadings. L.F. I at 173-180; App. at A30-A37. Accordingly, *de novo* review is appropriate, as the "only question on appeal is whether the trial court drew the proper legal conclusions" from the factual allegations contained in the pleadings. *Missouri Municipal League v. Carnahan*, 2011 WL 3925612 *2 (Mo. App. W.D. 2011) (trans. denied Dec. 20, 2011) ("*MML II*").

B. The Summary Statement for an Initiative Petition

Missouri initiative law requires that the Secretary of State prepare a "summary statement" for every initiative. § 116.334, RSMo. The summary statement must be "a concise statement not exceeding one hundred words," and "shall be in the form of a question using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure." *Id*. The purpose of the summary statement is to '"make[] the subject [of the proposal] evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal."' *Overfelt v. McCaskill*, 81 S.W.3d 732, 738 (Mo. App. W.D. 2002) (citation omitted). By definition, a "summary" of

an initiative must "cover[] the main points succinctly." Merriam-Webster's Collegiate Dictionary 11th ed. at 1250.

In preparing the summary statement, "[i]t is incumbent upon the Secretary…to promote an *informed understanding* of the *probable effect* of the proposed amendment." *Cures Without Cloning v. Pund et al.*, 259 S.W.3d 76, 82 (Mo. App. W.D. 2008) (emphasis added). '"The important test is whether the language fairly and impartially summarizes the purposes of the measure, so that the voters will not be deceived or misled."' *Id*. Although a summary statement need not include every "detail" of an initiative, or issues at the "periphery" of a proposal, the statement must "fairly and impartially *summarize*[] the purposes of the measure, so that the voters will not be deceived or misled." *Overfelt,* 81 S.W.3d at 738 (emphasis added).

If the Secretary's summary is "insufficient or unfair," it must be revised. § 116.190, RSMo. "Insufficient" and "unfair" have been defined as follows:

> Insufficient means "inadequate; especially lacking adequate power, capacity, or competence." The word "unfair" means to be "marked by injustice, partiality, or deception." Thus, the words insufficient and unfair ... mean to inadequately and with bias, prejudice, deception and/or favoritism state the [consequences of the initiative].

Missourians Against Human Cloning v. Carnahan, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006) (citation omitted).

C. The Summary Statement is Insufficient and Unfair

The summary statement drafted by the Secretary does not "fairly and impartially summarize[]the purposes" of the initiative petition, and the trial court erred in finding that the summary was "fair and sufficient." *Overfelt,* 81 S.W.3d at 738 (citation omitted). First, the summary statement misleadingly states that the initiative would *amend* Missouri law to annually adjust the state minimum wage according to changes in the Consumer Price Index ("CPI"). In fact, however, the state minimum wage is already annually adjusted in accordance with the CPI, and the statutory amendment proposed by the initiative would not change or alter this requirement. Second, the summary statement misleadingly states that the minimum wage for tipped workers is less than the minimum wage for non-tipped workers. This is also inaccurate, as under both current Missouri law and the amendments proposed by the initiative, the same minimum wage applies to tipped and non-tipped workers alike. Finally, the summary statement fails to adequately or accurately describe a core feature of the initiative: the enactment of a new provision that would adjust the state minimum wage according to future changes in the federal minimum wage.

These fundamental flaws in the Secretary's summary statement are likely to cause confusion and deception because they mislead petition signers and voters regarding the "purposes" and "probable effect" of the initiative. As such, a new summary should be certified to the Secretary that fairly and accurately summarizes the initiative.

1. The Initiative Petition Would Not Amend the Law to "adjust the state wage annually based upon changes to the Consumer Price Index"

The summary statement for the initiative is insufficient and unfair because it misleadingly states that the initiative would "amend" Missouri law to annually adjust the state minimum wage for changes in the cost of living. The summary statement asks whether "Missouri law should be *amended* to…adjust the state [minimum] wage annually based on changes in the Consumer Price Index." L.F. I at 39, 41 (emphasis added). The initiative, however, would make no such "amendment" to Missouri law. To the contrary, Missouri law already requires that the state minimum wage be annually adjusted according to any "increase or decrease" in the CPI. § 290.502, RSMo. The director of the Department of Labor is charged with determining the percentage of increase or decrease in cost of living, as measured by the CPI for Urban Wage Earners and Clerical Workers, and adjusting the state minimum wage, effective January 1 of each year, according to such changes. *Id*.

Thus, the summary statement inaccurately describes the initiative as "amending" Missouri law to add a statutory provision that already exists. As such, the summary statement falsely describes the legal effect of the initiative and the current requirements of Missouri law. As the Court of Appeals has found, a summary statement that purports to signal an "amendment" to Missouri law, when in fact, the "amended" provision already exists, is insufficient and unfair. *Missouri*

Municipal League v. Carnahan, 303 S.W.3d 573, 588 (Mo. App. W.D. 2010) ("*MML I*"). That is precisely the case here.

a. The *MML* Cases

The recent *MML* cases are instructive. In *MML I*, the Court of Appeals revised a portion of a summary statement that mistakenly suggested that an "eminent domain" initiative would *amend* the Missouri Constitution to require "just compensation" in the event of a taking of private property. In relevant part, the summary stated:

> Shall the Missouri Constitution be *amended* to restrict the use of eminent domain by:
>
> - Requiring that any taking of property be necessary for public use *and that landowners receive just compensation*;

Id. (emphasis added). While the new initiative would arguably have allowed for the application of "just compensation" under a new set of circumstances, this would only have been because the initiative proposed to amend the "public necessity" requirement for eminent domain. *Id*. ("The process for determining just compensation may be affected, but not the establishment of such compensation."). Importantly, however, Missouri law already required "just compensation" for takings. *Id.*

As a result, the Court of Appeals revised the summary statement by deleting the reference to "just compensation." *Id*. In doing so, the court rejected

the Secretary's argument that the need for "context" justified her inclusion of "just compensation" in the summary, because the language employed by the Secretary misleadingly suggested that the amendment would *add* a requirement of "just compensation." *Id*. Because the summary suggested that the initiative would add a constitutional provision that already existed, the summary was insufficient and unfair. *Id*.

Subsequently, in *MML II*, the Court of Appeals considered a new summary statement for a substantially similar "eminent domain" initiative. 2011 WL 3925612 *3. The Secretary's summary statement at issue in *MML II* contained the following bullet point:

> Shall the Missouri Constitution be amended to restrict the use of eminent domain by:
>
> - Requiring that any taking of property be necessary for a public use *while continuing to provide just compensation*;

Id. at *3 (emphasis in original). In *MML II*, the Secretary's clarification that the law would "continue" to provide "just compensation" made all the difference. Unlike the summary statement at issue in *MML I*, which was "potentially prejudicial in that it suggested a change was being made to the Constitution regarding 'just compensation' that was not being amended," the summary at issue in *MML II* did "not suggest a change is being made to the current Missouri Constitution with respect to 'just compensation.'" *Id*. By adding the phrase "while

continuing to provide just compensation," the summary in *MML II* made "clear that the Missouri Constitution currently provides for 'just compensation.'" *Id*. (emphasis added) As a result of this clarification, the Secretary's summary statement in *MML II* was deemed sufficient and fair.

b. The trial court's flawed reasoning

Completely ignoring *MML I*, the trial court purported to rely on *MML II* to find that the summary statement's reference to the CPI was "fair and sufficient" because it was "essential to provide the necessary context for the provision being changed." L.F. I at 176 ¶ 12; App. at A33 ¶ 12. As interpreted by the trial court, the proposed measure would change how the state minimum wage is calculated. Specifically, in the event the federal minimum wage becomes higher than the state minimum wage, the higher federal rate "would become the state minimum wage." L.F. I at 177 ¶ 13; App. at A34 ¶ 13. Thus, instead of requiring employers to pay the higher of the state or federal wage (as is currently required), the "state minimum wage" would automatically increase to meet the higher federal wage, and "[n]o longer would it be one or the other." *Id.* As a result of this proposed change to Missouri law, the trial court reasoned that referencing the CPI was necessary to inform voters that the state minimum wage, "regardless of its source," would be subject to annual cost of living adjustments. L.F. I at 178 ¶ 16; App. at A35 ¶ 16.

The trial court completely missed the relevant holdings of the *MML* cases. It is undisputed that, in drafting her summary statement, the Secretary may include

contextual references to current provisions of Missouri law. It is also undisputed that such references may be "essential" in order for petition signers and voters to properly understand the impact of a proposed measure. As illustrated in the *MML* cases, however, the *manner* in which such context is provided is the key.

In providing "context," the Secretary may not employ language that suggests "a change [is] being made" to current law that is not being made. *MML II*, 2011 WL 3925612, *3. Instead, when referencing existing law, the Secretary must "make[] clear" to petition signers and voters that the referenced provision already exists. *Id*. This is the principle of the *MML* cases. The summary statement in *MML I* was insufficient and unfair because it suggested the initiative would "amend" Missouri law to require "just compensation" where "just compensation" was already required, and the summary statement in *MML II* was deemed sufficient and fair because in referencing "just compensation" for purposes of "context," the Secretary made clear that "just compensation" would "continue" to be required. Simply put, although the Secretary may reference existing law in order to provide "context," the Secretary may not employ language that misleadingly suggests that an initiative would enact a provision that already exists.

Here, the summary statement for the initiative does not state that the measure would "continue" to adjust the state minimum wage according to the CPI. Instead, it states that the initiative would "amend" Missouri law to "adjust the state wage annually based upon changes in the Consumer Price Index." Thus, unlike *MML II*, there is no indication that annual adjustments to the state minimum wage

are already required under Missouri law. The trial court opined that "*MML II* does not require the use of 'continue to' prior to every reference to existing law." L.F. I at 177 ¶ 12; App. at A34 ¶ 12. Perhaps. But there must be *some* language distinguishing between true "amendments" to the law and contextual references to existing law. Misleading voters that a measure would "amend" Missouri law to add a provision that already exists does not "fairly and impartially summarize[] the purposes of the measure…." *Overfelt*, 81 S.W.3d at 738 (emphasis added).

The minimum wage initiative would *not* "amend" Missouri law to require that the "state wage" be annually adjusted according to the CPI. Although the initiative would "amend" how the "state wage" is calculated, annual CPI adjustments to the "state wage" are already required. The Secretary's summary statement is insufficient and unfair and will cause prejudice to opponents of the initiative by suggesting that an "amendment" is necessary in order to adjust the state minimum wage according to changes in the cost of living.

Notably, the same fix employed by the Secretary in the *MML* cases may be (and should have been) employed here: clarify that the state wage would "continue" to be adjusted according to the CPI. Absent such clarifying language, the summary statement is insufficient and unfair. The trial court erred in finding that the summary "constitutes a fair and sufficient summary of the[] proposed changes in the law." The summary should be revised, and the trial court should be reversed.

2. The Initiative Petition Will Not Amend Missouri Law to "increase the minimum wage for employees who receive tips to 60% of the state minimum wage"

The summary statement also misleads voters regarding the impact of the proposed measure on the minimum wage for tipped employees. The summary statement states that the initiative would "increase the *minimum wage* for employees who receive tips to 60% of the *state minimum wage*." L.F. I at 39, 41 (emphasis added). This is false as a matter of law.

a. The "minimum wage" for tipped employees

Under both current law and the "amended" law proposed by the initiative, there is only <u>one</u> state "minimum wage." § 290.502, RSMo. And, importantly, tipped and non-tipped workers alike must be compensated <u>at or above</u> the state "minimum wage." *Id.* Missouri law does not permit a lower minimum wage for tipped employees, nor would the statutory measure proposed by the initiative.

Missouri law does permit employers of tipped employees to directly pay as little as 50% (or 60% under the initiative) of a tipped employee's compensation, but only so long as that employee's "total compensation" equals "at least" the state "minimum wage." § 290.512. In other words, under both the current and proposed minimum wage law, the distinction between tipped and non-tipped employees relates to what portion of their compensation is directly paid by their employer, *not* the "minimum wage" that they are entitled to receive. *Id.*

Accordingly, the summary statement's description that the initiative would "increase the *minimum wage* for employees who receive tips to 60% of the state minimum wage" blatantly misstates the law. By misstating the law, the summary statement misleadingly appeals to voters who may fear that tipped workers are receiving less than the "minimum wage" and need an "increase" to sixty percent. In fact, however, employers are required to ensure that tipped workers make 100% of the "minimum wage" required under state law; there is no special cut-rate "minimum wage" for tipped workers, beyond which their compensation is left to the sweat of their brow or the fickle generosity of patrons.

b. The trial court's flawed rationale

The trial court found that the Secretary's summary was "fair" because it "tracks the language of the proposal." L.F. I at 179 ¶ 18; App. at A36 ¶ 18 ("Indeed, it can hardly be said to be misleading for the Secretary of use the very language in the proposed amendment as part of the summary statement"). However, the summary statement does *not* "track" the "very language" of the proposal. As noted above, the summary statement states that the initiative would "increase the *minimum wage* for employees who receive tips to 60% of the state minimum wage," but no such provision is contained in the proposed amendment. Instead, the proposal would merely change the minimum *employer-paid portion* of compensation from 50% to 60% of the "minimum wage." Contrary to the summary statement, the "minimum wage" for tipped employees is not a mere fraction of the state "minimum wage."

The relevant statutory provision and the Department of Labor's regulations are clear that the "minimum wage" is a term that applies *exclusively* to the full amount that a tipped worker is entitled to receive. On the other hand, the fraction of this wage rate that an *employer is required to directly pay* is simply referred to as "compensation" or "wages." For example, Section 290.512 states that employers must "pay wages" of "fifty percent of the minimum wage rate," and must increase this amount if tips are insufficient to bring the employee's compensation to the state "minimum wage." § 290.512, RSMo. In other words, the "minimum wage" is the overall compensation the employee must receive, and this amount is guaranteed by the employer. The "minimum wage" does not refer to the employer's 50% (or 60% under the initiative) employer-paid compensation minimum.

Similarly, the Department of Labor regulations refer only to the total compensation required—not the employer-paid compensation—as the "minimum wage":

> Tipped employees shall receive at least the **applicable minimum wages** as set forth in this rule, except that the employer may claim gratuities as a **credit toward the payment of the required minimum wage**. The maximum amount of gratuities that the employer can claim as a credit is [50%] of the **applicable minimum wage rate**. In no event shall the amount of wages and gratuities equal less than the **applicable minimum wage**, with the

> difference between the gratuities and the **minimum wage** being paid by the employer.

8 CSR 30-4.020 (emphasis added). Indeed, the regulation makes even clearer that gratuities are a sort of credit that is applied against the "minimum wage." The "left-over" after these credits are applied is not the "minimum wage"; rather, the "minimum wage" is the overall number against which the credits are applied.

The trial court implicitly conceded that the summary statement is "technically" wrong, but it reasoned that "the entirety of the complex minimum wage law and its associated application to tipped employees…could not and need not be provided" in the summary statement. L.F. I at 179 ¶ 18; App. at A36 ¶ 18. The trial court's conclusion is flawed for two reasons. First, the existence of a "complex" law does not authorize the Secretary to draft a summary statement that inaccurately describes that law. At a minimum, Missouri voters are entitled to a summary statement that is "technically" accurate.

Second, it was not necessary for the Secretary to have included the "entirety of the complex minimum wage law" in order to accurately describe the initiative. As shown by Mr. Allred's suggested summary statement in the circuit court, an accurate and complete bullet point can be prepared using the same number of words as used by the Secretary. The fix is simple: rather than falsely stating that the initiative would "increase the *minimum wage* for employees who receive tips to 60% of the state minimum wage," an accurate summary would state that the

initiative would "increase the *minimum employer-paid wage* for tipped employees to 60% of the state minimum wage."

This is not a question of whether Mr. Allred's suggested changes are "preferable" or the "best language." *Missourians Against Human Cloning*, 190 S.W.3d at 457. The issue is more fundamental: the Secretary's statement *falsely* describes the proposed measure. It is inaccurate and misleading to inform voters that the fraction of the "minimum wage" that an employer must pay is the "minimum wage" for tipped employees. Yet that is exactly what the Secretary's summary does. It suggests that tipped workers make some fraction of the "minimum wage" that is so low that 60% is an "increase." By calling the minimum employer-paid compensation the "minimum wage" for tipped workers, the summary also misleadingly suggests that workers are on their own to gather enough tip income to reach the "minimum wage" that applies to all other non-tipped workers. This is false. Tipped and non-tipped employees alike must be compensated at or above the "minimum wage."

Both by misstatement of the law and by omission, the Secretary's summary fails to fairly and accurately describe the initiative. The trial court erred in holding that the summary statement is sufficient and fair.

3. The Summary Fails to Describe the Super-Escalator Provision of the Initiative That Ties the State Minimum Wage to the Federal Minimum Wage

Finally, the summary statement fails to inform petition signers and voters of the core feature of the initiative: the automatic increase in the state minimum wage in the event the federal minimum wage is higher. Presently, Missouri law requires that employers pay the higher of the state minimum wage or the federal minimum wage. § 290.502, RSMo. As noted above, the state minimum wage, set in 2006 at $6.50 per hour, is annually adjusted according to changes in the CPI. The federal minimum wage, presently $7.25 per hour, is not adjusted according to the CPI. Despite annual cost of living adjustments, the state minimum wage has not yet caught up to the federal wage. Thus, under current Missouri law, employers are required to compensate employees at the federal minimum wage of $7.25 per hour. In the event the state minimum wage eventually meets or exceeds the federal minimum wage, employers in the state of Missouri will then compensate employees according to the state minimum wage.

This will all change under the statutory measure proposed by the initiative. Under the proposed amendment to Section 290.502, in the event the federal minimum wage is higher than the state minimum wage, the state minimum wage will be increased to meet the federal minimum wage. Because the state minimum wage is annually adjusted according to the CPI, the effect of this seemingly subtle amendment is significant. Instead of merely requiring that employers pay the

higher federal rate (as currently required), the higher federal rate will become the state rate and will thereafter be subject to additional, compounding increases arising from changes in the CPI. In short, the applicable minimum wage in the State of Missouri will increase virtually every year.

This is a sea change in Missouri law, but the summary statement makes little mention of it. Instead, the summary statement merely asks whether Missouri law should be "amended to…increase the state minimum wage to $8.25 per hour, or to the federal minimum wage if that is higher…." L.F. I at 39-40, 41-42. On its face, this description merely repeats what is currently required by state law. As described above, the state minimum wage is *already* adjusted according to the CPI, and Missouri employers are *already* required to compensate employees according to the higher of the state and federal rates. Only a careful analysis of the proposed text of the amendment reveals the super-escalator effect.

This significant change in Missouri law was apparently lost on the Secretary in drafting her summary. As noted above, the proponents of the initiative submitted two versions of the initiative: Version 1, at issue in this appeal, and Version 2, for which the proponent appears not to have timely submitted any signatures to the Secretary. Importantly, Version 2 did *not* contain the super-escalator contained in Version 1. Thus, under Version 2, although employers would continue to pay the higher of the state or federal minimum wage, the official state minimum wage would not permanently increase to meet the federal minimum wage, and therefore CPI adjustments would not be applied to the higher

federal minimum wage, which would serve only as a temporary stand-in. *Nonetheless, the Secretary drafted identical summary statements for both Version 1 and Version 2*. Thus, the Secretary implicitly concedes that the summary for Version 1 does not describe the super-escalator provision, because she employed the very same summary to describe Version 2.[4]

By failing to clearly inform petition signers and voters of the super-escalator provision of the proposed amendment, the summary fails to "cover[] the main points" of the initiative. Merriam-Webster's Collegiate Dictionary 11th ed. at 1250. Under the initiative, absent deflation, Missouri's minimum wage will increase every year, and future increases may be built upon wage rates legislated in Washington, D.C., not Jefferson City. The failure to advise petition signers and voters of this significant change is a fatal flaw in the summary statement, and the summary should be revised to adequately describe the impact of this proposed amendment.

[4] The Secretary may argue, as she did in the trial court, that her summary for Version 1 was actually an attempt to describe the super-escalator. What the Secretary has never explained, and cannot explain, is why she used the exact same language to describe Version 2, which she recognizes *does not have the escalator*. The Secretary cannot have it both ways: either her summary statement accurately describes current law (essentially, Version 2) by providing "context", or it describes the super-escalator (Version 1). It does not accurately describe both.

4. A New Summary Should Be Certified

In light of the forgoing inaccuracies and inadequacies in the Secretary's summary, a new summary should be certified. The *MML* cases provide clear guidance on how to provide essential "context" without misleading voters. Specifically, the summary can simply indicate that the law will "continue" to adjust the state minimum wage according to changes in the CPI. The summary may not, however, state that Missouri law will be "amended" to provide for such adjustments, luring voters to support the measure by promising them things they already have. Nor can the summary falsely state that it would make the "minimum wage" for tipped employees 60% of the state minimum wage. Finally, the summary may not omit or conceal major changes in the law, including the super-escalator that will likely require increases in the minimum wage every year.

II. THE TRIAL COURT ERRED BECAUSE THE FISCAL NOTE AND FISCAL NOTE SUMMARY ARE INSUFFICIENT AND UNFAIR IN THAT THEY DO NOT COME CLOSE TO ASSESSING OR ESTIMATING THE DIRECT COSTS OF THE MINIMUM WAGE INCREASE, AND THEN FALSELY SUGGEST THAT TAX REVENUE INCREASES MAY NOT BE OFFSET IF BUSINESSES ARE FORCED TO REDUCE EMPLOYMENT OR SPENDING TO PAY FOR THE WAGE HIKE.

A. Introduction: Mr. Allred's "Sufficiency and Fairness" Appeal Is Related to the Issue of Whether the Auditor Has Constitutional Authority to Prepare Fiscal Notes and Summaries

Mr. Allred successfully contended before the trial court that based on the language of the Missouri Constitution and the facts of this case, the Auditor is not performing an authorized constitutional function when he assembles fiscal notes and fiscal note summaries for initiative petitions. L.F. II at 229-233; App. at A24-A28. That is because the statute that commands the Auditor's performance, Section 116.175, RSMo., does not ask the Auditor to perform what our constitution requires: a true "investigation" that is also related to the "supervising and auditing of the receipt and expenditure of public funds." Instead, it asks him to oversee a less rigorous, almost clerical compilation or assembly of predictions by various third parties about what might happen to future costs and revenues.

Relevant to Point II, Mr. Allred also argued that in this case, the Auditor's work product fell even below the lower standard set by Sections 116.175 (which requires the Auditor to "assess" future fiscal impact, and issue a "statement" of his "estimate" of costs and revenues) and Section 116.190 (which forbids the Auditor's fiscal note and fiscal note summary from being "insufficient" and "unfair"). The trial court disagreed, holding that under recent court of appeals decisions, so long as the Auditor pasted third parties' attempted forecasts verbatim into his fiscal note, and so long as the items mentioned in his summary could be found somewhere within the fiscal note, Section 116.175 was satisfied.

As an initial point, if this clerical task is truly all that Section 116.175 requires, then it definitely is not an "investigation" as required under the Missouri Constitution—and in fact, this was the trial court's holding. Mr. Allred parts ways with the trial court because Section 116.175 *does* require something more than paper shuffling, even if the "something more" still falls short of an "investigation."

The "something more" is addressed in Mr. Allred's Point II. It is simply the basic requirement that the Auditor's final work product (1) adequately describe the measure's fiscal impact; and (2) fairly and accurately summarize the materials the Auditor either received or would have received had he tried to adequately describe the fiscal impact. As discussed below, the plain language of Sections 116.175 and 116.190, read together, require no more and no less.

First, the Auditor's minimal efforts fell far below his constitutional dignity and duties (and even below the requirements of Sections 116.175 and 116.190)

because he made no effort to answer a basic question: whether Missouri's public employers would pay higher wages that "exceed $1 million," or instead, would exceed an amount *ten or twenty times that number*. The Auditor simply parroted verbatim what he received from a tiny fragment of the public sector, made no effort to follow-up with Missouri's largest cities, counties, or public employers, and reported the truism that whatever the real cost, it will "exceed" the sum of what he received from the handful of responders.

Meanwhile, the Auditor seized upon proponents' assumption (for purposes of predicting positive effects of the measure) that $360 million in new wages would be paid out by both public and private entities. Although it turned out that the Auditor was off by about a factor of 16, he needed no economist to deduce that public cost increases could be nowhere near $1 million if the combined public-private total was $360 million. The Auditor's work on direct costs was no "assessment" under Section 116.175, nor was it "sufficient" or "fair." § 116.190, RSMo.

Second, the Auditor accepted the proponent's late estimate of a $14.4 million annual increase in indirect revenues from the infusion of new wages into the economy, but misleadingly reported only that "business decisions" could "impact" any increase. In fact, the fiscal note evidence suggested that if any accounting was made for businesses who had to make "decisions" on how to afford the wages, they would *cut* jobs and investment, *reducing*, not just

"impacting," the revenue increase. This misleading summary also violates Section 116.190 and should result in reversal of the circuit court.

B. The Standard of Review Is *De Novo*

This appeal directly challenges the trial court's application of the law to the facts. For that reason, the standard of review is *de novo*: this Court must decide whether the trial court's legal reasoning was erroneous. *White v. Dir. of Revenue*, 321 S.W.3d 298, 307-08 (Mo. banc 2010) ("In appeals from a court-tried civil case, the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.") (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). *See also Pearson v. Koster*, --S.W.3d-- SC92317, 2012 WL 1926035 (Mo. banc May 25, 2012) ("how the law applies to [the] facts" is reviewed *de novo*).

The *de novo* standard is particularly applicable when the facts the trial court found to be dispositive were uncontested by the parties:

> Evidence is uncontested in a court-tried civil case when the issue before the trial court involves only stipulated facts and does not involve resolution by the trial court of contested testimony; in that circumstance, the only question before the appellate court is whether the trial court drew the proper legal conclusions from the facts stipulated.

White, 321 S.W.3d at 308.

Although at trial, Mr. Allred and the proponents disputed the actual effects of the proposed wage increase, the trial court declined to find in favor of either side, or even to reach these issues. L.F. II at 218-229; App. at A13-A24 (Opinion at 13-24). Instead, it based its conclusion that the fiscal note was "sufficient and fair" entirely on (1) the actual materials received by the Auditor's office during the 20-day window after the Auditor received the proposed initiative from the Secretary of State; and (2) its interpretation of legal precedent from the Court of Appeals. *See* L.F. II at 221-222; App. at A16-A17 (Opinion at 16-17) ("Under governing case law, all the Auditor is required to do is to compile information he receives..."). The contents of the materials actually received by the Auditor were uncontested by any party, and in fact were the subject of a stipulation. L.F. II at 208-209; App. at A3-A4, A46-A122

Although this Court has not recently had occasion to consider this standard in a petition case, the Court of Appeals frequently applies the *de novo* standard in such cases. Indeed, in a case relied upon the trial court, the Court of Appeals applied *de novo* review in deciding challenges to (1) the process used by the Auditor to prepare fiscal notes and summaries and (2) the fairness and sufficiency of a particular note and summary. *See MML I*, 303 S.W.3d at 579-580. Citing authority from this Court that was also collected in *White*, the Court of Appeals held that the trial court's conclusions on both issues were appropriate for *de novo* review. *Id*. On the "process" issue, the Court of Appeals observed that "when reviewing the arguments related to the process followed by the Auditor's office in

preparing the fiscal notes, the facts are not in dispute," meaning that "the circuit court's legal conclusions and application of the law to the facts are reviewed without deference to the circuit court's conclusions." *Id*. Similarly, on the second issue, "the parties argued the fairness and sufficiency of the Secretary's summary statements based on stipulated facts, joint exhibits, and undisputed facts. Thus, the only question on appeal is whether the trial court drew the proper legal conclusions, which we review *de novo*." *Id*. at 580.

This Court should apply the same *de novo* standard. Although the parties contested the underlying issues relating to economic and fiscal effects of the minimum wage, the trial court simply did not reach these issues. That is because the trial court considered itself bound by recent Court of Appeals cases like *MML I* to find in favor of the Auditor so long as the Auditor copied third-party submissions "verbatim" into the fiscal note (L.F. II at 220; App. at A15) and the Auditor's summary includes elements that can be located somewhere within the fiscal note (L.F. II at 224-228; App. at A19-A23). These facts were not in dispute. Instead, the parties disputed and contested the meaning and application of those facts under the law.

Accordingly, under *White*, this Court is not called upon to second-guess any factual finding made by the trial court regarding what the Auditor received or prepared. Instead, it should review *de novo* the trial court's legal conclusion that the actual materials received by the Auditor, coupled with a particular reading of

Court of Appeals precedent, compelled it to find in favor of the defendants. As discussed below, this Court should find that the trial court erred.

C. The Trial Court Erroneously Applied Case Law from the Court of Appeals in a Manner that Diverges from the Plain Language and Intent of Section 116.175

The trial court committed a debilitating threshold error in its review of the fiscal note for sufficiency and fairness. Its error was one of law: the court granted the Auditor such broad discretion to avoid performing specific tasks—the tasks which the Auditor "may" perform in preparing a fiscal note—that the court eviscerated the Auditor's single non-discretionary duty: to create a real, *bona fide* assessment and "estimate" of the fiscal impact of the petition. § 116.175, RSMo.

Fiscal note disputes are uncommon in this Court, but the overall context is familiar. Statutes frequently assign discretionary tasks to an administrator within the overall context of a mandatory duty that the administrator must perform. The discretionary duties typically consist of various tasks the administrator may or may not undertake in completing the mandatory duty. *See, e.g.*, *State ex rel. Kansas City Power & Light Co. v. McBeth*, 322 S.W.3d 525, 532-534 (Mo. banc 2010) (assessor must assess real property, but has "discretion to exercise independent judgment when valuing and assessing property"). But the discretion given to administrators in carrying out the "how" of their duties cannot be so broad that it undermines the "what:" their ultimate mandate.

When administrators exercise such broad discretion that their acts lose any rational connection to their mandatory duty, courts invalidate the administrative decision as "arbitrary and capricious." *See Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266, 281 (Mo. App. W.D. 2000) ("Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision…. Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable. *Id.* To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or 'gut feeling.'"). In short, tactical discretion cannot be so broad that the administrator is free to operate outside of the mandate.

Under Section 116.190, trial courts review the Auditor's decision not for mere arbitrariness or capriciousness, but for "insufficiency" and "unfairness." These terms are given their dictionary definitions, and their plain meaning is more stringent than the "arbitrary and capricious" standard. *See Missourians Against Human Cloning*, 190 S.W.3d at 456 (citation omitted) ("Insufficient means 'inadequate; especially lacking adequate power, capacity, or competence.' The word 'unfair' means to be 'marked by injustice, partiality, or deception.').

In recent Missouri fiscal note challenges, plaintiffs have attacked not only the sufficiency and fairness of recent Auditors' fiscal notes, but also the adequacy of the process used to prepare the notes. In response, the court of appeals and circuit courts determined that the Auditor was not *required* under Section 116.175

to undertake certain additional procedures in those cases. But now some courts—like the trial court here—erroneously read these cases to suggest that so long as the Auditor mechanically plods through the bare minimum discretionary procedures that happened to be approved on the facts of those cases, there can be no review of whether the Auditor's end result *really does* (1) "assess the fiscal impact" of the measure and (2) state its "estimated cost or savings…to state or local governments." § 116.175, RSMo. This is clear legal error.

1. Section 116.175 Assigns the Auditor a Clear Duty to "Assess the Fiscal Impact" of the Petition and "State the Measure's Estimated Cost or Savings…to State or Local Governmental Entities"

There is no question under Section 116.175 that regardless of what methods the Auditor chooses to use to prepare a given fiscal note and summary, the end result of his labors "shall" be a bona fide "assessment" of the fiscal impact of the measure, and "shall" include a fiscal note and summary which state "the measure's estimated cost or savings, if any to state or local government entities." In relevant part, the statute provides as follows:

> 1. …upon receipt from the secretary of state's office of any petition sample sheet, joint resolution or bill, the auditor **shall assess the fiscal impact of the proposed measure**. The state auditor *may consult* with the state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of

> the proposal. Proponents or opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact estimating the cost of the proposal… provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state.
>
> 3. **The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities.** The fiscal note summary shall contain no more than fifty words, excluding articles, which **shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure**.
>
> 4. The attorney general shall, within ten days of receipt of the fiscal note and the fiscal note summary, approve the legal content and form of the fiscal note summary prepared by the state auditor and shall forward notice of such approval to the state auditor.

§ 116.175, RSMo. (relevant mandatory duties are bolded, and discretionary duties are italicized).

The Court of Appeals has correctly recognized that there are both mandatory and discretionary elements of the Auditor's duty. *See MML II*, 2011 WL 3925612, *5 (noting that Section 116.175 requires that the Auditor "shall" perform an assessment, but renders certain subordinate tasks "entirely discretionary" by suggesting that the Auditor "may" use particular tools at his

disposal). As discussed below, the fact that the Auditor has discretion to decide *not* to use the tools at his disposal does not mean that in every case in which he fails to do so, the end results of his efforts must be immune from challenge.

2. The Trial Court Erroneously Relied Upon the Court of Appeals' *MML* Opinions in Deciding that the Auditor's Discretion not to Conduct a Detailed Inquiry Trumps Even His Mandatory Duty to Render a Bona Fide Assessment of Fiscal Impact

MML I stands only for the proposition that on the facts of that case, the following set of procedures was "adequate to satisfy" Section 116.175:

(1) placing entities' responses in the fiscal note if they are reasonable and complete;

(2) obtaining clarification from the entity if the responses are unclear; and

(3) if responses are unreasonable, placing less weight on the response in the fiscal note summary.

Id. at 582. Significantly, neither of the *MML* cases[5] held that so long as the Auditor mechanically plods through these motions on a given initiative petition,

[5] The trial court purports to also rely on *MML II*, which merely extended *MML I* by holding that the procedures described in *MML I* did not need to be promulgated as rules. That holding is irrelevant to the claims and defenses in this case.

the fiscal note and summary are automatically "sufficient" or "fair." In other words, the procedures do not immunize the fiscal note and summary from attack, providing a complete affirmative defense to any and every Section 116.190 challenge.

Nonetheless, at the Auditor's urging, the trial court adopted this "procedural immunization" view of the law. The case was open and shut because:

> Here, the evidence shows that the submissions of fiscal impact contained in the fiscal notes are listed verbatim as received from the submitting entities or individuals. In those submissions, there is supporting material for the State Auditor's statements in the fiscal note summaries. The Court of Appeals has repeatedly upheld this process of the Auditor drafting fiscal notes.

L.F. II at 220; App. at A15 (Opinion at 15 (citing only *MML I* and *II*)). The court concluded:

> This precedent from the court of appeals governs the issues in this case. Plaintiff seeks to challenge the sufficiency and fairness of the fiscal notes by asserting that the State Auditor had to go outside the submissions he received and do his own independent analysis and research…However, this is clearly rebutted by the court of appeals rulings in [*MML I* and *II*]. Under controlling case law, all the Auditor is required to do is compile information he receives from

state agencies, local governmental entities and proponents and opponents of a measure.

L.F. II at 221-222; App. at A16-A17 (Opinion at 16-17).

The problem with the trial court's approach is that in some cases, the Auditor's rote repetition of this particular set of discretionary procedures will not yield a sufficient or fair fiscal note or fiscal note summary. Nor will rigid adherence to these discretionary procedures necessarily and in every case yield work product that actually fulfills the Auditor's two mandated duties in Section 116.175: that (1) he "shall" conduct a bona fide "assessment" of the fiscal impact of the measure, and (2) "shall" include a fiscal note and summary which state "the measure's estimated cost or savings, if any to state or local government entities."

As discussed below, the Auditor's attempt to rigidly adhere to the bare-bones discretionary procedures he believed had been blessed in *MML I* and *II* led to a fiscal note that was insufficient and unfair in two major respects.

D. The Fiscal Note and Summary Are Insufficient and Unfair in Two Important Respects

1. The Fiscal Note and Summary Are Insufficient and Unfair Because They Include No Real "Assessment" or "Statement" of an "Estimate" of the Direct Cost of the Minimum Wage Increase to Localities and Political Subdivisions

Both the fiscal note and fiscal note summary are "insufficient and unfair" because they evince no real "assessment" (*see* § 116.175.1) or "estimate" of the

direct costs that state and local government entities will bear (*see* § 116.175.3) by paying higher wages to their workers. The Auditor admitted that the issue of direct cost was the "key" issue for the ballot title. Tr. 65:20-66:2. Yet the Auditor's process and conclusions fall far short of any applicable standard, whether it is the lower "arbitrary and capricious" standard or the higher "insufficient and unfair" standard that is specifically applicable to fiscal notes for ballot measures.

a. The Auditor's Use of a "Cross Section of a Cross Section" of the Whole, Making No Effort to Approximate the Value of the Whole, Was Mere Guesswork

First, the Auditor dealt with the "most important" issue in the fiscal note, the direct cost borne by public entities paying higher wages for thousands of public workers, by simply adding up the numbers reported in the grand total of seven responses he received from among the hundreds of state and local agencies in Missouri. *See* L.F. I at 45-48, 59-62; App. at A71-A74, A85-A88. The Auditor sent just twenty-five requests to a pre-set list of large and small localities and political subdivisions which he considered a "cross-section," even though the same "cross-section" is used for every fiscal note to hit the Auditor's desk. Tr. 80:5-81:4. The Auditor made no effort to determine the number (he allowed only that there could be "potentially" hundreds) or types of political subdivisions employing minimum wage workers. Strikingly, even though the Auditor does audit (or is potentially responsible for auditing) hundreds of state and local

agencies and political subdivision, he made no effort to even begin to arrive at a general understanding of the number or basic proportion of state and local agencies that might be affected by the increase. Tr. 66:13-67:14.

The Auditor never intended to use his "cross-section" in the usual manner—to make a projection, extrapolation, or estimate regarding the size or characteristics of the "whole." Tr. 68:21-69:5. When asked why the Auditor never makes a projection or extrapolation as part of the fiscal note process, Jon Halwes, the Auditor's sole employee who performs substantive fiscal note work, simply stated, "I can't answer that question." *Id*. Without any coherent plan for drawing conclusions from the seven-entity cross-section, the Auditor resorted to simple arithmetic. Mr. Halwes added up the dollar costs reported by the seven entities. He then informed Missouri voters that the total for all state and local agencies and political subdivisions would "exceed" the sum from this tiny sample. This truism is no "assessment" of the measure's fiscal impact, nor is it a "statement" of a legitimate "estimate" of the "cost" of the measure to state and local government entities. *See* § 116.175. RSMo.

b. The Auditor Knew that His "Exceeds $1 Million" Statement Was Not Close to the True Cost of the Proposed Minimum Wage Hike

The undisputed, uncontested evidence showed that even with the minimal effort he expended, the Auditor knew that total costs had to dwarf the $1 million figure he reported, not just "exceed" it. First, Mr. Halwes "knew from the local

governments that didn't respond…that clearly there would be more." Tr. 92:2-5. The Auditor had received the following responses:

City of Columbia	$140,885.01
City of Jefferson City	$98,947.00
City of St. Joseph	$102,350.00
City of St. Louis	failed to address direct costs
Jasper County	$0 (all workers exceeded the minimum)
Linn State Technical College	$25,000
Metropolitan Community College	$405,000
Office of Administration	$540,000 (or "over" this amount)

L.F. I at 45-48, 59-62; App. at A71-A74, A85-A88.

This smattering of responses itself added up to over $1.3 million. Mr. Halwes made no effort to follow-up with the state's largest cities, Kansas City, Springfield, or St. Louis, which either failed to respond at all or which failed to address the issue in their response. Mr. Halwes made no effort to follow up with large community colleges and universities, such as the University of Missouri, or with any of the seven large counties who failed to respond. L.F. I at 56, 70; App. at A82, A96; Tr. 73:3-13.

Indeed, Mr. Halwes did not even attempt to find out why certain entities failed to respond to his request. Tr. 70:10-71:3. With respect to the City of St. Louis, which the Auditor's office had errantly assumed was the largest city in Missouri (Tr. 69:6-17), Mr. Halwes later claimed he simply "didn't see a need to"

make any contact after the City of St. Louis inexplicably left off a "direct cost" number from its fiscal impact statement. Tr. 71:3.[6] This was despite the fact that the office recognized the City of St. Louis was "potentially" the most relevant city in the state (Tr. 71:4-6), because "the bigger the city the more relevant the result it gives you in terms of costs." Tr. 69:14-17.

The Auditor's inexplicable refusal to take any follow-up action with any of the state's largest public employers contrasts sharply with the office's rationale for "choosing not to enforce" a statutory "10-day limit" for receiving parties' fiscal

[6] The Auditor clearly made no "completeness" review of the City's response. Even at trial, after he had already been deposed in the case, Mr. Halwes seemed to believe that the City of St. Louis had given a written explanation about why it believed the direct costs from a minimum wage increase was "unknown." Tr. 69:23-70:9. Only after reviewing a copy of the actual fiscal note, including St. Louis' response, did Mr. Halwes recognize that the City had completely failed to provide a response on the *direct cost* of an increase, focusing its entire explanation on the indirect economic and fiscal impact on *revenues*. Tr. 70:5-24. Mr. Halwes made no attempt to find out why St. Louis had omitted direct cost from its response, failing to even respond that the costs were "unknown." Tr. 70:25-71:6. Mr. Halwes' failure to check St. Louis' response for completeness and follow-up with a request for more information was therefore contrary to the bare-bones process approved by the Court of Appeals in *MML I*.

impact statements. Tr. 82:14-22. Mr. Halwes claims that the office disregards the ten-day deadline because "the more information that we can obtain the better fiscal note and fiscal note summary we can have, and if we get it within the time frame to allow us to analyze it, then I'm going to include it." *Id.* Mr. Halwes failed to apply this rationale to what the Auditor's office considered the most important part of the fiscal note, the reporting of direct costs.

The Auditor's office already knew from its own failure to make any analysis of its "cross section within a cross section" (other than adding seven sums) that its $1 million figure could not bear any relationship to the real statewide total. But when it accepted the proponents' fiscal impact statement out of time pursuant to its professed policy of "the more information, the better," the Auditor's office gained yet another clue—a clue that it failed to follow—that its "exceeds $1 million" figure was wildly off-base. The proponents estimated—and the Auditor then agreed and adopted the assumption—that Missouri employers, both public and private, would pay out an additional $360 million each year as a result of the minimum wage increase. L.F. I at 50, 64; App. at A76, A90. But of that massive $360 million combined payout by private and public employers, the Auditor's "direct cost" statement assumes that state and local government agencies and political subdivisions' share is merely some amount that "exceeds" $1 million. This is tantamount to an assumption that Missouri public entities employ only 1/360th of statewide minimum wage workers. The Auditor's policy of "the more information…the better" apparently allowed it to accept the proponents' $360

million figure, but not to circle back even once with the same agencies it audits to determine whether the $1 million it gleaned from just seven responders was even close to the correct number.

As the proponents' own estimates should have made clear to the Auditor, the direct costs to state and local agencies and political subdivisions are not close to $1 million. The true cost "exceeds" $1 million only in the sense that it "exceeds" $500,000, $100,000, or $1. Mr. Allred's expert witness, Dr. David Macpherson, testified that the true cost is over $16 million per year. Tr. 149:10-151:4. Dr. Macpherson was able to use publicly-available data from the Current Population Survey ("CPS") to make a reliable calculation, and did not require a complete roster of every Missouri worker. Tr. 150:16-151:13. Dr. Macpherson's entire analysis on all parts of the fiscal note, of which this work was only one part, took just 12 to 15 hours. Tr. 141:14-17.

The Auditor did not have Dr. Macpherson's analysis, but he did have the results of his own initial review and the $360 million public-and-private cost estimate provided by the proponents themselves. He had enough information to know that the sum total of reports of seven mid-sized entities, out of a possible set of hundreds of small, medium, and large state and local agencies and political subdivisions, could not have been close to the correct number, even tacking on the verb, "exceeds."

c. The Note and Summary Are Mere Guesswork, Do Not Contain an "Assessment" or "Statement" of an "Estimate" of the Cost of the Measure, and Are Therefore Insufficient and Unfair

The portions of the fiscal note and summary dealing with "direct costs" easily meet the criteria for "insufficient" and "unfair," and would even fail under an arbitrary and capricious standard of review. "Insufficient means 'inadequate; especially lacking adequate power, capacity, or competence.' The word 'unfair' means to be 'marked by injustice, partiality, or deception.'" *Missourians Against Human Cloning*, 190 S.W.3d at 456 (citation omitted).

As discussed above, the Auditor made no effort to determine the direct cost of the measure other than to add up the responses of seven entities—a cross section of a cross section of hundreds of entities—and report that the true statewide cost will "exceed" that incomplete total. The Auditor accepted other information indicating that the combined public and private costs would total hundreds of millions of dollars, yet never questioned whether the public portion—encapsulated in his "will exceed $1 million" statement—might be supplemented by even the most minimal effort to approach Missouri's largest cities, counties, and other public employers for an estimate. Given the data that the Auditor could have obtained, the fiscal note and summary are easily "inadequate; especially lacking adequate [descriptive] power, capacity, or competence." *Id.*

Additionally, the Auditor's statement is "marked by injustice" and "partiality," if not "deception." On the one hand, citing an insatiable thirst for "more information," the Auditor accepted the proponents' late fiscal impact statement, which reported mammoth increases in private and public wage outlays in order to justify an argument, essentially adopted by the Auditor, that these wages would indirectly result in higher state tax revenues. Yet on the other hand, the Auditor's thirst for "more information" inexplicably failed him when it came to the "cost" side of the equation, which the Auditor claimed to be the most important part of the fiscal note analysis. Mr. Halwes made no effort whatsoever to follow up with the largest public employers in the state, whom he knew would provide the "most relevant" information for cost purposes. Nor, having accepted the revenue implications from the proponents' late claim of $360 combined public and private wage outlays, did Mr. Halwes reconsider whether his prior estimate of "will exceed $1 million" might have understated the public share of the $360 million. On its face, the Auditor's pursuit of "more information" only to increase the revenue side, not the cost side, of the fiscal note analysis evidences injustice and partiality.

The Auditor's analysis would also fail under the more relaxed "arbitrary and capricious" standard that would apply absent the specific "insufficient or unfair" standard in Section 116.190, RSMo. Under that standard, "gut feelings" and "guesswork" cannot form the basis for an agency decision:

> An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence. Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision. Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable. **To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or "gut feeling.**" An agency must not act in a totally subjective manner without any guidelines or criteria.

Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ., 34 S.W.3d 266, 281 (Mo. App. W.D. 2000) (emphasis added) (citations omitted). *See also Barry Serv. Agency Co. v. Manning*, 891 S.W.2d 882, 892 (Mo. App. W.D. 1995) (finding Director of Finance's decision that consumer lender's interest rates were not "appropriate" was arbitrary and capricious, and observing that "If the Director is going to reject rate schedules on the stated or unstated ground that the rates therein are 'inappropriate,' a more searching inquiry based on some kind of objective data rather than mere surmise, guesswork, or a 'gut feeling' will be necessary to meet basic standards of due process and to avoid being arbitrary, unreasonable, and/or capricious.").

Here, through Mr. Halwes, the Auditor's office admitted that it sometimes followed-up when a response seems "incomplete" or the issues "directly impact

them." Tr. 89:23- 90:17. It claims to do this on a "case-by-case basis." Tr. 90:18-19. The Auditor's guiding light is Mr. Halwes' own determination as to whether data will be "relevant to the voters." Tr. 34:4-35:1; 66:7-12 ("mission to get all the facts that would produce a relevant fiscal note and summary for the voters"); Tr. 68:1-6 (adding up figures from the few responders on costs would "provide the voters at least some information"); Tr. 71:19-72:5 (telling voters that proposal "will exceed $1 million" when single community college reported $405,000 in costs meets the "relevant to the voters" standard because in the opinion of the Mr. Halwes, "The voters are going to understand that there is going to be cost increases for state and local governments in that regard…"); Tr. 73:3-16 (in response to question of whether Auditor's office should have tried to determine if costs were only slightly over $1 million, or were "$10 or $20 million," responding that "I would say that we put in the work to comply with the requirements of 116.175, and to the extent that we're providing relevant information to the voters, we did that.").

Crucially for purposes of "arbitrary and capricious" review, no person oversees or reviews Mr. Halwes' work, and he employs no objective or even discernible subjective criteria in deciding whether given information will be "relevant to the voters:"

> Q. Well, you would agree with me that over a million, as in 1.4, 1.5 million, is a substantial difference from over a million as in 10 or 20 million, correct?

A. Definitely there is a difference.

Q. Well, it is a substantial difference, right?

A. There is a difference how much it is going to affect the voter. In terms of his or her decision process, I don't know.

Tr. 72:10-18.

Q. Let me ask you this, Mr. Halwes. On the issue of direct costs, which you said was the most important part of the fiscal note summary, was it relevant for voters to know whether the cost was $1.2 or $1.3 million or $10 or $30 million?

A. That's the question?

Q. Yes.

A. The—I'm not sure that any of the numbers are going to resonate with the voters any more than another. And the purpose—I mean, I specifically used the term exceed. I didn't use the term over or about, with the understanding that the voter would see that it is going to be over a million dollars, exceed a million dollars.

Q. What criteria do you use to determine what is going to be relevant to the voters?

A. It is going to vary by fiscal note that we're doing, in terms of the type of information that we get in and what we can pull together from the various sources.

Q. Ultimately isn't it just guesswork?

A. Well, everything that we're doing here is to some extent guesswork.

Tr. 73:25-74:20.

Ultimately, the Auditor's office engaged in nothing better than "guesswork" when Mr. Halwes made decisions about what data he believed voters would find "relevant." *See Barry*, 891 S.W.2d at 892 (agency's determination of whether lender's rates were "appropriate" was arbitrary, capricious and unreasonable, because its failure to consider profit margins for business or other objective data rendered its analysis mere "guesswork"). As its failure to follow-up with the City of St. Louis and with Missouri's other large public employers shows, the Auditor's office uses no objective criteria in deciding whether to solicit what it considers "relevant" data from public entities or follow-up to ask for more information. The Auditor's office happily employs its supposed policy of welcoming "more information" when it receives proponents' data on supposed "indirect" fiscal benefits even after the 10-day statutory deadline has passed, yet fails to so much as pick up the phone when a public agency fails to answer its first—and only—inquiry on the most important issue in a fiscal note: the direct costs. Mr. Halwes' gut feelings about what voters will think about a "$1 million" or a higher direct cost is not an objective standard, and as this case shows, it is open to almost any interpretation, including the whim of the single employee the Auditor's office assigns to drafting fiscal notes. *See* Tr. 30:11-17 (generally, and also in this case, no person reviewed the single employee's work).

Accordingly, the fiscal note and summary fail even the "arbitrary and capricious" standard, let alone the higher "insufficient or unfair" standard of Section 116.190. The trial court erred as a matter of law when he decided that the mere fact that the Auditor claimed to use the "process" discussed in *MML I*, coupled with the fact that the fiscal note contained at least $1 million in costs, insulated the Auditor's work product from attack under Section 116.190. This Court should reverse.

2. The Fiscal Note Summary Unfairly Reports a High Revenue Increase Without Disclosing that this Amount Is Certain to Decrease

The Auditor's fiscal note summary insufficiently and unfairly states that tax revenue could increase by the surprisingly precise number of "$14.4 million annually," but then glosses over undisputed reports in the fiscal note which make clear that if this number is achieved from the "positive" side of the wage increase, it is just a ceiling that will certainly decrease as the "negative" side is accounted for: businesses either lay off workers or cut spending. Rather than simply reporting that "job or spending cuts by employers will offset some or all of the increase," the summary piles on extra, awkward words and phrases that appear nowhere else in the fiscal note, allowing the positive $14.4 million increase to appear clearly and precisely while muddying the negative half of the analysis with a theoretical and indeterminate phrase: "business employment decisions will impact any potential change in revenue."

This is insufficient and unfair in at least three respects. **First**, the fiscal note materials indicated that business investment decisions—not just "employment" decisions—could be used to offset the increased costs due to the wage increase. **Second**, the fiscal note materials are clear and explicit that the "decisions" are cuts; there is no possibility that businesses will react to increased labor costs by hiring more workers or increasing spending and investment. **Third**, the fiscal note materials are clear and explicit that reduced spending or employment will reduce, not just "impact" revenue increases. Because the contents of the fiscal notes are undisputed, the trial court's legal conclusions that none of these three errors are "insufficient" or "unfair" are reviewed *de novo*. *White*, 321 S.W.3d at 307-08.

a. The Summary Is Insufficient and Unfair Because it Fails to Mention Business "Spending" Decisions, Fails to State that Businesses' "Employment Decisions" Are Actually Job Cuts, and Fails to Mention that if They Occur, These Factors Will Decrease, Not Merely "Impact," Revenue Collections

As to the first point, the only materials the Auditor received—both from the Office of Administration and from the proponents—indicated that among five possible "indirect" effects were cuts in (1) employment *or* (2) business investment. The Office of Administration predicted "lower overall employment (if employers choose to hold costs steady)" and "lower business investment (if employers' payrolls increase)." L.F. I at 46, 60; App. at A72, A86. The proponents, copying a

2006 Office of Administration format and layering in their own projections, also submitted predictions of "the potential for lower employment, especially at firms dependent on low-wage labor," and "the potential for decreased business investment by certain firms dependent on low-wage labor." L.F. I at 53, 67; App. at A79, A93. Finally, the City of St Louis predicted that "While raises to the minimum wage could potentially result in an increase in local earnings and payroll taxes, there is also the potential that the increased payroll costs could be offset by a reduction in workforce at affected establishments thus negating all or a portion of the revenue gains." L.F. I at 48, 62; App. at A74, A88.

There was absolutely no evidence before the Auditor indicating that *only* job cuts, and not also cuts in business investment, would occur. Mr. Halwes specifically acknowledged and admitted at trial that both types of cuts could occur in order to compensate for increased wage costs. Tr. 59:17-62:7. Accordingly, the Auditor did not adequately summarize the fiscal note when he reported that only "employment decisions" could "impact" potential increased revenues.

Second, absolutely no materials received by the Auditor indicated that minimum wage hikes would have any affect other than to *decrease* employment, or investment, or both. Both the Office of Administration and the proponents submitted a list of bullet points indicating that, not surprisingly, the employer cost effects of a wage increase would be *negative*. L.F. I at 46, 60; 53, 67; App. at A72,

A86; A79, A93.[7] In what can only be viewed as an unnecessarily awkward use of euphemisms in order to avoid mention of negative consequences, the Auditor's summary refers to "employment decisions" (L.F. I at 43, 57; App. at A69, A83) instead of, for example, the specific language in the City of St. Louis' response regarding "workforce reductions." L.F. I at 48, 62; App. at A74, A88.

Third, the Auditor attempted muddle the fact that businesses' job or spending cuts would *reduce* any increased revenues, choosing instead to state that business decisions would "impact" revenue increases. L.F. I at 43, 57; App. at A69, A83. For reasons known only to the Auditor, his office did not choose to inform voters that the "impacts" from such decisions (at least as reported in the

[7] Illustrating the depth of the Auditor's illogic, Mr. Halwes briefly attempted to deny that wage hikes would even be expected to cause job cuts, because they would instead somehow spur businesses to "re-engineer how they do their process," and the re-engineered processes might in some unexplained fashion actually cause them to hire "more employees." Tr. 61:4-16. Absolutely nothing in the record and nothing received by the Auditor from any person supported such a wild assumption. At any rate, Mr. Halwes was immediately impeached by his own deposition testimony which expressly acknowledged the opposite. Tr. 61:17-62:11. The willingness of Mr. Halwes to entertain such an unsupported theory while testifying under oath raises serious questions about the objectivity of the Auditor's analysis.

fiscal note) would all point one direction: down. The only facts that the Auditor received from submitters indicated that job cuts and decreased business investment would have a *negative* effect on tax revenues, not a positive one. L.F. I at 48, 62; App. At A74, A88. At best, the proponents' late submission makes no calculation of any negative economic or fiscal effects from forcing businesses to find $360 million to pay workers. But even then, Mr. Halwes admitted that the proponents' failure made their analysis "somewhat incomplete," and claimed that it had been necessary to address this incompleteness "as part of the fiscal note summary." Tr. 58:5-59:15. And ultimately, Mr. Halwes acknowledged that the $360 million in new wage income (upon which he relied to assume a state revenue increase of $14.4 million) "would either potentially come out of revenues or profits of businesses." Tr. 59:17-25.

On each of these three points, a review of the undisputed evidence—all of the materials received by the Auditor—pointed one way, and despite putting up a desperate fight at trial to avoid admitting what he had already received and assumed, Mr. Halwes ultimately had to admit that he received, relied upon, and could produce no evidence indicating that if the $14.4 million materialized, it had anywhere to go but down, based on businesses' job or investment cuts. To claim that the $14.4 million could merely be "impacted" by "business employment decisions," when the only relevant fiscal note evidence suggested that it would be reduced, can only be viewed as an attempt to paper over the negative evidence.

b. The Trial Court Committed Legal Error by Looking Only to Ensure that the $14.4 Million Figure Appeared Somewhere in the Fiscal Note and by Failing to Ensure that the Entire Sentence Describing the Indirect Revenue Impacts Was a Fair Summary of the Fiscal Note

The trial court's principal error was its misplaced reliance on the *MML* cases. The trial court appeared to believe that so long as the Auditor accepted the proponents' late submission and pasted it verbatim into his note, and so long as parts of the fiscal note summary can be mined from "supporting material" in the "submissions," the Auditor's summary could not be attacked. L.F. II at 220; App. at A15. First, this is not the holding of *MML I* or *II*, cited by the trial court. While *MML I* approved the process used by the Auditor in that case, it separately reviewed the summary to determine whether it was fair and adequate.

Second, the trial court was clearly mistaken in its own summary of the undisputed and uncontested contents of the fiscal notes. The trial court claims that the fiscal notes "project an increase in state income and sales tax revenues in the amount of $14.4 million, which could be impacted by business decisions. The fiscal note summary says exactly the same thing." L.F. II at 225; App. at A20. This is wrong. As already discussed, the Auditor did not view the fiscal note as a clear-cut projection of revenue increases, viewing the $14.4 million revenue increase—tellingly, made only by the petition proponents, and by no other

responder—as "somewhat incomplete," requiring the incompleteness to be "counted for" in the fiscal note summary. Tr. 58:5-59:15.

More importantly, as discussed above, the trial court failed to recognize that *no fiscal note responder used the awkward and vague formulation of the fiscal note summary*, that tax revenue increases could occur but "business employment decisions will impact any potential change in revenue." L.F. I at 43, 57; App. at A69, A83. The Office of Administration merely chose five "impacts" without predicting definite increases of decreases in revenue. L.F. I at 46, 60; App. at A72, A86. Indeed, what the trial court cites as the "content" of the notes—a definite increase with some potential for further "impact" based on "business decisions" is actually just the Auditor's own choice of words for his summary. L.F. I at 43, 57; App. at A69, A83. Thus, the trial court simply failed to correctly state the undisputed and uncontested facts when it suggested that one or more responses in the fiscal note found that "increased revenues" would occur and would only be subject to some indeterminate "impact" from "business decisions."

In conclusion, the Auditor focused most of his brief summary on the supposed "indirect" effects—the effects on revenue after the economy experiences ripple effects from businesses' payment, and workers' receipt, of hundreds of millions of dollars in increased wages. But while the Auditor suggested a surprisingly precise annual "increase" of $14.4 million based on the *positive* half of the equation (workers' receipt of their wages), he failed to note that if the *negative* half of the equation occurs (businesses must make decisions on where to

come up with the hundreds of millions of dollars to pay the workers), it will assuredly *decrease*, not merely "impact," the precise $14.4 million "increase" he postulated. Section 116.190 exists precisely to block such sleight of hand, although Missourians should expect more from a neutral and professional Auditor. In addition to the Auditor's serious oversight regarding direct costs, the Auditor's failure to sufficiently and fairly convey the fiscal note projections regarding indirect costs supplies another reason for reversing the trial court.

CONCLUSION

Missouri citizens, through their duly elected representatives, have enacted statutory safeguards to promote and protect the people's initiative right. In order to ensure that Missouri petition signers and voters have an informed understanding of the purpose, legal effect, and fiscal impact of a proposed measure, the Secretary of State and State Auditor have been tasked with preparing a summary statement, fiscal note, and fiscal note summary for each petition. In assigning these duties, Missourians did not grant the Secretary and Auditor unfettered discretion with which to perform their tasks. Indeed, to do so would have completely undermined the purpose of requiring a summary statement, fiscal note, and fiscal note summary, because petition signers and voters would be left to rely on the unchecked, subjective conclusions of these state officials (or their subordinates). Instead, Missouri law sets out standards to guide the Secretary and Auditor. These standards cannot be watered down through agency policies or judicial fiat.

The summary statement, fiscal note, and fiscal note summary for the initiative petition fail to comply with the standards set by Missouri law. A summary statement must be "sufficient" and "fair." A summary that falsely describes the purpose and effect of a proposed measure is neither. Objective falsehoods may not be disregarded as "technicalities." The law requires more. Likewise, the Auditor is charged with "assess[ing] the fiscal impact of [a] proposed measure," and the fiscal note and fiscal note summary must "state the measure's estimated cost or savings" in a manner that is "fair" and "sufficient." §§ 116.175, 116.190, RSMo. As described above, the Auditor performed no "assessment" here, and the fiscal note and fiscal note summary do not reasonably inform voters of the "fiscal impact" of the initiative.

The trial court's judgment on the summary statement should be reversed and a new summary statement should be certified. In addition, the insufficiency and unfairness of the fiscal note summary provides yet another reason to strike it from the official ballot title, although the Court need not reach this issue if it affirms the trial court's ruling that the Auditor had no constitutional authority to prepare it in the first place. Either way, the judgment of the circuit court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief (a) contains the information required by Rule 55.03, (b) was prepared using Microsoft Word 2010 in Times New Roman size 13 font, and (c) complies with the word limitations of Rule 84.06(b) in that it contains 17,911 words.

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I hereby certify that on the 8th day of June, 2012, the foregoing Brief and its Appendix was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on the following counsel of record:

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